

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
BRIAN S. MILLER, JUDGE

DIVISION I

CACR06-1067

May 16, 2007

LONDON ANN-DENISE BANKS
APPELLANT

v.

STATE OF ARKANSAS
APPELLEE

AN APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT
[CR-06-364]

HONORABLE JOHN W. LANGSTON,
JUDGE

AFFIRMED

Appellant London Banks challenges the sufficiency of the evidence supporting her conviction of domestic battery in the second degree. We affirm.

Banks was charged with domestic battery in the second degree, pursuant to Ark. Code Ann. § 5-26-304 (Repl. 2006), for stabbing her live-in boyfriend, Corey Brisco, in the chest. She waived her right to a jury trial, and her bench trial was held on May 5, 2006.

At the trial, Brisco testified that, on November 7, 2005, he was upset when Banks failed to wake him up for work. Later that day, he returned from work and Banks was not home. When he called her, she said she wanted to end their relationship and told him that she was going to Brenda Kuykendall's house. Brisco walked to Kuykendall's home to speak to Banks but she rebuffed him, so he returned home and waited for Banks outside in his car.

Banks returned home later that evening with her sister, Brenda Briles, and locked Brisco out of the house. While Brisco attempted to talk to Banks through the door, a neighbor approached and asked him to calm down. Brisco accompanied the neighbor back to the neighbor's home and the two sat outside.

Brisco later returned home and when Briles left, Brisco picked up Banks's one-year old son and carried the child with him into a back room where he tried to talk to Banks. He became upset when Banks mentioned the child's father, so he pushed Banks and Banks responded by stabbing him with a knife. After Banks stabbed him, Brisco went to grab a pair of scissors and Banks fled to a neighbor's house.

Brisco stated that, during the altercation, he was not mad or upset. He said he only wanted to know why they were arguing. Although Brisco denied hitting Banks on November 7, he said that he had hit her on a previous occasion. He also stated that Banks had stabbed him on another occasion.

Banks testified that she was only trying to defend herself on November 7. She said that Brisco was jealous and violent throughout the course of their relationship and she believed he was drunk on November 7. She testified that he was physically abusive and that he routinely hit her, even when she was pregnant. Banks admitted to stabbing Brisco on a previous occasion.

She said that, while Brisco was at work, she decided she no longer wanted a relationship with him. She said that she told him not to follow her to Kuykendall's house and

that she and Kuykendall asked Brisco to leave. Banks said Brisco became upset when he saw her enter Kuykendall's house with another man.

Banks testified that later that day, while she was driving through their neighborhood with her son, Brisco approached and tried to enter the car through the sun-roof. This scared Banks, so her sister accompanied her home. Once her sister left, she told Brisco that she was tired of fighting, and she then went to her daughter's bedroom. Brisco began pushing her from behind. When Banks mentioned her son's father, Brisco pushed her so hard that she fell into the window. Banks then grabbed a knife from her daughter's dresser and stabbed Brisco. Brisco then left to grab something from another room and Banks ran to a neighbor's house.

Banks moved to dismiss at the close of the evidence, alleging that she acted in self defense and that, under the circumstances, she had the right to use deadly force to defend herself. The trial court denied the motion. Thereafter, the trial court, giving strong consideration to the credibility of the witnesses, found Banks guilty of battery in the second degree.

Banks now argues that the trial court erred when it denied her motion to dismiss. A motion to dismiss is identical to a motion for a directed verdict in a jury trial and is a challenge to the sufficiency of the evidence. *Springs v. State*, 368 Ark. 256, ___ S.W.3d __ (2006); *Russell v. State*, 367 Ark. 557, ___ S.W.3d __ (2006). The test for determining the sufficiency of the evidence is whether substantial evidence supports the verdict. *Aydelotte*

v. State, 85 Ark. App. 67, 146 S.W.3d 392 (2004). Substantial evidence is evidence forceful enough to compel the fact-finder to make a conclusion one way or the other without resorting to speculation or conjecture. *Eagle v. State*, 92 Ark. App. 328, ___ S.W.3d ___ (2005). We view the evidence in the light most favorable to the State, considering only the evidence supporting the verdict. *Brock v. State*, 90 Ark. App. 164, 204 S.W.3d 562 (2005). We do not weigh the evidence presented at trial or assess the credibility of witnesses, as these are matters for the finder of fact. *Id.*

Banks specifically argues that the trial court erred in denying her motion to dismiss because the State failed to introduce substantial evidence that she was not justified in using physical force to defend herself from the unlawful use of physical force by Brisco. Justification is not an affirmative defense which must be pled, but becomes a defense when any evidence tending to support its existence is offered to support it. *Anderson v. State*, 353 Ark. 384, 108 S.W.3d 592 (2003). Because justification is not an affirmative defense, the State has the burden of negating the defense once it is put in issue. *Id.*

Arkansas Code Annotated section 5-2-606(a)(1) (Repl. 2006) provides:

A person is justified in using physical force upon another person to defend himself or herself or a third person from what the person reasonably believes to be the use or imminent use of unlawful physical force by that other person, and the person may use a degree of force that he or she reasonably believes to be necessary.

The defense of justification, being largely a matter of the defendant's intent, is essentially a question of fact to be decided by the trier of fact. *Smith v. State*, 30 Ark. App. 111, 783 S.W.3d 72 (1990). A defendant's intention, being a subjective matter, is ordinarily not

subject to proof by direct evidence, but must be established by circumstantial evidence. *Taylor v. State*, 28 Ark. App. 146, 771 S.W.2d 318 (1989). Evidence of specific acts of violence that were directed at an accused or were within his knowledge are probative of what the accused reasonably believed at the time and thus relevant to his/her plea of self defense. *Humphrey v. State*, 332 Ark. 398, 966 S.W.2d 213 (1998).

Banks argues that Brisco was the initial aggressor and that he employed unlawful physical force when he pushed her. “Unlawful physical force” is defined as:

[P]hysical force that is employed without the consent of the person against whom it is directed and which the employment of the physical force constitutes a criminal offense or tort or would constitute a criminal offense or tort except for a defense other than the defense of justification or privilege.

Ark. Code Ann. §5-2-601(8) (Repl. 2006). We agree that Brisco was the initial aggressor and employed unlawful physical force. At the very least, Brisco’s conduct constituted assault in the third degree because he purposely created an apprehension of imminent physical injury to Banks, pursuant to Ark. Code Ann. § 5-13-207 (Repl. 2006). This, however, does not necessarily mean that Banks’s conduct was justified.

The State argues that Banks’s actions amounted to the use of deadly force and that, under the circumstances, there was no justification for the use of deadly force. The use of deadly force is governed by Ark. Code Ann. § 5-2-607 (Repl. 2006), which provides:

- (a) A person is justified in using deadly physical force upon another person if the person reasonably believes that the other person is:
- (1) Committing or about to commit a felony involving force or violence;
 - (2) Using or about to use unlawful deadly physical force; or
 - (3)(A) Imminently endangering the person’s life or imminently about to

victimize the person as described in § 9-15-103 from the continuation of a pattern of domestic abuse.

(B) As used in this section, “domestic abuse” means the same as defined in § 9-15-103.

(b) A person may not use deadly physical force in self-defense if he or she knows that he or she can avoid the necessity of using deadly physical force with complete safety:

(1)(A) By retreating.

(B) However, a person is not required to retreat if the person is:

(i) In the person’s dwelling and was not the original aggressor; or

(ii) A law enforcement officer or a person assisting at the direction of a law enforcement officer; or

(2) By surrendering possession of property to a person claiming a lawful right to possession of the property.

In support of its argument, the State points out that the knife is a deadly weapon. *See, e.g., Bly v. State*, 213 Ark. 859, 214 S.W.2d 77 (1948).

The question therefore is whether the force employed by Banks exceeded the force necessary for defusing the situation. Throughout their relationship, both Banks and Brisco were physically and verbally abusive towards each another. In fact, during a prior incident of verbal abuse by Brisco, Banks stabbed Brisco. Here, there was substantial evidence that Banks’s excessive force was unjustified. Their history indicates that the stabbing could have been avoided, had Banks simply removed herself from the home. We therefore hold that there was substantial evidence to support the trial court’s denial of her motion to dismiss and we affirm.

Affirmed.

GLOVER and BAKER, JJ., agree.